Office-Supreme Court, U.S.
FILED
AUG 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1150

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HOWARD ELLIS, *et al.*,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,

Respondents.

ALLEN L. FAILS, *et al.*,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,

Respondents.

BRIEF *AMICI CURIAE* OF MID-ATLANTIC LEGAL FOUNDATION, JOSEPH P. GALDA, THOMAS ODOM, AND THOMAS CARROLL IN SUPPORT OF PETITIONERS HOWARD ELLIS, *ET AL.* and ALLEN L. FAILS, *ET AL.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Myrna P. Field*
Mid-Atlantic Legal Foundation
1521 Locust Street — Suite 600
Philadelphia, PA 19102
(215) 545-1913
Attorney for Amici Curiae Mid-Atlantic Legal Foundation, Joseph P. Galda, Thomas Odom, and Thomas Carroll

Of Counsel:
John G. Collins
Mid-Atlantic Legal Foundation, Inc.
219 East 42nd Street — 5th Floor
New York, NY 10017
(212) 557-1350

Joseph W. Marshall, III
Mid-Atlantic Legal Foundation
1521 Locust Street — Suite 600
Philadelphia, PA 19102
(215) 545-1913

*Counsel of Record

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

TABLE OF CONTENTS

	Page
Interest of the *Amici Curiae*	2
Summary of Argument	3
Argument	4
I. Extraction of Ideological Fees is Unconstitutional	5
A. The Constitutional Principle	5
B. This Fee Cannot Be Extracted	8
II. Collective Bargaining Activities Must Have a Sufficient Nexus to the Fee Payor	11
Conclusion	14
Certificate of Service	15

TABLE OF AUTHORITIES

Cases:

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) ..... passim

Carroll, et al. v. Blinken, et al., No. 83-1272 (S.D.N.Y. filed February 17, 1983) 3

Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 685 F.2d 1065 (9th Cir. 1982) 11, 13

Elrod v. Burns, 427 U.S. 347 (1976) 9, 12, 13

Galda, et al. v. Bloustein, et al., 516 F.Supp. 1142 (D.N.J. 1981) 2, 7

Galda, et al. v. Bloustein, et al., 686 F. 2d 159 (3d Cir. 1982) 3, 7

International Association of Machinists v. Street, 367 U.S. 740 (1961) 6, 8, 12

Railway Clerks v. Allen, 373 U.S. 113 (1963) . 6, 10

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

Railway Employes' Department v. Hanson, 351 U.S. 225 (1956) 6

West Virginia Board of Education v. Barnett, 319 U.S. 624 (1943) 5

Other Authorities:

U.S. CONST. Amend. I ..... passim

U.S. CONST. Amend. IV 6

U.S. CONST. Amend. V 6

No. 82-1150

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HOWARD ELLIS, *et al.*,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,

Respondents.

ALLEN L. FAILS, *et al.*,

Petitioners

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,

Respondents.

BRIEF *AMICI CURIAE* OF MID-ATLANTIC LEGAL FOUNDATION, JOSEPH P. GALDA, THOMAS ODOM, AND THOMAS CARROLL IN SUPPORT OF PETITIONERS HOWARD ELLIS, *ET AL.* and ALLEN L. FAILS, *ET AL.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTEREST OF THE AMICI CURIAE

Pursuant to this Court's Rule 42, Mid-Atlantic Legal Foundation, Joseph P. Galda, Thomas Odom and Thomas Carroll hereby move the Court for leave to file the attached brief as *amici curiae*. Consent was secured from counsel for both parties. Copies of these letters have been filed with the Court.

Amicus, Mid-Atlantic Legal Foundation (MAtLF) is a nonprofit corporation engaging in nonpartisan legal research, study and analysis for the benefit of the general public concerning the effects of evolving concepts of law on our democratic institutions. Among its functions is to provide legal representation on matters of public interest at all levels of administrative and judicial activity. MAtLF is primarily interested in issues of national scope that have a direct effect on the Mid-Atlantic region, namely, Delaware, Maryland, New Jersey, New York, Pennsylvania and West Virginia.

MAtLF is representing university students in two cases involving issues similar to those presented in the instant case. One of these cases has involved extensive hearings and argument at both the district and circuit court levels. The other has been more recently commenced. Both cases involve the issue of whether the state may extract a mandatory student fee which is then transmitted, directly or indirectly, to off-campus groups alleged to be ideological. These exacted fees are compelled as a condition of matriculation each semester.

Amici, Joseph P. Galda and Thomas Odom are or were students at Rutgers, the State University of New Jersey. Both pay or paid discrete mandatory fees each semester. In this case, the district court granted summary judgment for the defendants on the ground that a procedure for refund existed. *Galda v. Bloustein*, 516 F.Supp. 1142 (D.N.J. 1981). On appeal, the United States Court of Appeals for the Third Circuit reversed, holding that where the entire fee is successfully challenged, a refund

will not cure the otherwise unconstitutional exaction. *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982). The case was remanded and is pending in the district court.

Amicus, Thomas Carroll was a student at a constituent college of the State University of New York. He paid a mandatory, non-refundable student activity fee each semester. The complaint in which he is one of the plaintiffs challenges an identifiable portion of this fee. The case, which is in its early stages, is pending in the United States District Court for the Southern District of New York. *Carroll v. Blinken*, No. 83-1272 (S.D.N.Y. filed Feb. 17, 1983).

The mandatory student fee cases have been analyzed by the courts which have considered them as analogous to the compelled agency fee cases. Thus, *amici* believe they are in a position to bring to the Court's attention information bearing upon the resolution of this matter, which will not be presented by the other participants.

SUMMARY OF THE ARGUMENT

A union may not compel the payment of that portion of an agency shop fee to be devoted to ideological purposes, regardless of any refund procedure it may have effected, from non-union employees who object. Moreover, any collective bargaining activities, supported by a mandatorily extracted fee, must be directly linked to the contributing employee.

The freedom to support ideological causes and the freedom to associate are guaranteed by the First Amendment to the United States Constitution. These freedoms are fundamental and may only be infringed if confronted by a paramount government interest.

Any mandatory agency shop fee which is to be devoted, in part, to other than permissible collective bargaining activities must be separated. Thereafter, both

portions of this fee must be independently justified *prior* to extraction.

Amici are unaware of any paramount government interest which would justify the First Amendment infringement inherent in the mandatory exaction of the ideological portion of the agency shop fee at issue. Moreover, the ability to compel payment of a portion of the fee does not authorize the extraction of the whole.

Similarly, the presence of a refund procedure will not cure the underlying constitutional infringement. It merely perpetuates a system of continuous constitutional violations. At best, a refund will only remedy past wrongs. This is true even if the refund procedure is coupled with the ability to extract a portion of the fee.

Finally, the definition of the scope of permissible activities which properly relate to collective bargaining, and are thus subject to mandatory contributions, must include the requirement that there be a sufficient nexus to the contributing employee. In this way, the union will remain free to finance its legitimate collective bargaining activities, while leaving the affected employee free to support and associate, or refrain from support or association, as he or she desires.

ARGUMENT

This case essentially presents two issues. First, may a union, acting pursuant to an agency shop agreement, collect that portion of a mandatorily extracted agency shop fee to be expended for political or ideological purposes, whether or not a refund mechanism is available to dissenters. Second, what activities are to be defined as constitutionally linked to collective bargaining purposes as established in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

The proper resolution of these issues requires an affirmation of the *Abood* holding that monies extracted pursuant to an agency shop agreement may only be spent on collective bargaining activities. Therefore, monies that cannot be spent, cannot be collected. Furthermore, it requires a clarification that the First Amendment to the United States Constitution permits the mandatory extraction of fees and their expenditure for only those collective bargaining activities which are directly related to the individual employee.

I.

Extraction of Ideological Fees is Unconstitutional

A. *The Constitutional Principle*

Proper analysis begins with the Constitution itself. It is the law of the land that:

> [i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what should be orthodox in politics, nationalism, religion, or other matters of opinion. . . .

West Virginia Board of Education v. Barnett, 319 U.S. 624, 642 (1943), cited with approval in *Abood*, 431 U.S. at 235.

The fact that this case involves the right not to associate and be subjected to compelled payment, rather than the right to be free to associate as one chooses creates no constitutional distinction. *Abood*, 431 U.S. at 234.

The pristine right to associate or not is constitutionally fundamental. Beginning in 1956, a line of four cases defined a narrow statutory intrusion on First Amendment rights in the union arena. This limited intrusion was justified by a finding of a compelling national interest in industrial peace. *Abood*, 431 U.S. at 224.

Railway Employes' Dept. v. Hanson, 351 U.S. 225 (1956) and its progeny — *Street*, *Allen*, and *Abood*[1] — did not erode or invite incursion upon the constitutional principle of freedom from compelled expression or association. Each reinforced the fundamental nature of this principle. This Court has repeatedly focused on the constitutional necessity of safeguarding the First Amendment freedoms of each citizen. "Once an association with others is compelled by the facts of life, special safeguards are necessary lest the spirit of the First, Fourth, and Fifth Amendments be lost and we all succumb to regimentation." *Street*, 367 U.S. at 776, (Douglas, J., concurring).

Throughout the past quarter century, this Court has not assailed that principle. The principle has, however, been assailed elsewhere. While this Court has spoken with clarity on the need for the protection of substantive First Amendment rights, it has, of necessity borne of these cases, left open the dictation of appropriate remedies. The Court's development of remedial guidelines, culminating in the clear suggestion of *Street*, 367 U.S. at 773, adopted in *Abood*, 431 U.S. at 240-241, has pointed to remedies which must protect against mandatory intrusion on constitutional rights. Nevertheless, others, including courts, have relied on these guidelines to encroach upon constitutional rights and to justify their violation.

Amici are informed that there exist today over thirty cases involving mandatory union fees, portions of which are used over citizen objection. [See Appendix C accompanying the *Petition for a Writ of Certiorari* in the instant case.] They are involved in two cases involving mandatory extraction by state universities of mandatory student fees paid over to, and used by, two organizations

---

1. *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

amici allege to be ideological. One of these has developed a substantial record, *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982). In the district court, summary judgment was granted to the university in the face of allegations that the entire fee was ideological. Amici had sought an injunction against the collection and payment of these fees. Apparently confusing this Court's holdings reinforcing constitutional principles with this Court's remedial guidelines, the district court reasoned that no constitutional violation had occurred because a refund mechanism existed. *Galda v. Bloustein*, 516 F.Supp. 1142, 1148 (D.N.J. 1981). On appeal, the United States Court of Appeals for the Third Circuit reversed, holding that if the entire fee were ideological, a refund could not cure the resulting constitutional infirmity.

The Third Circuit expressly refused to rule on the effect of a refund in a case such as that presented in *Abood* where a refund might, in that court's view, provide the only available administrative remedy. The Third Circuit's decision apparently presents at least one legal and one practical difficulty. Legally, the administrative difficulties of a constitutional violator are simply not in the same orbit as the fundamental constitutional right violated. Practically, the elevation of administrative problems creates an infinite number of potential encroachments by the violator. The popular presumption may be that ideology is an infinitely small portion of an otherwise justified fee. In reality, however, ideology might take on increasing percentages of the total, albeit less than all. Thus, one dollar of a justified fee could be used to secure an unlimited amount of otherwise illegitimate fees. Whatever the quantitative invasion:

> the individual should not be forced to surrender *any* matters of conscience, belief, or expression. He should be allowed to enter the group with his own flag flying, whether it be religious, political, or philosophical; *nothing* that the group does should de-

> prive him of the privilege of preserving and expressing his agreement, disagreement, or dissent, whether it coincides with the view of the group, or conflicts with it in *minor or major* ways; and he should not be required to finance the promotion of causes with which he disagrees.

Street, 367 U.S. at 776, (Douglas, J., concurring). (Emphasis added). This Court should not deviate from this principle, whether as a matter of substantive constitutional law or of remedy.

B. *This Fee Cannot Be Extracted*

The *Abood* Court clearly stated that a union may not spend involuntary contributions for political or ideological purposes. 431 U.S. 209. It did, however, permit a union, pursuant to an agency shop agreement, to exact a contribution from all employees for its collective bargaining efforts. *Abood* carefully delineated collective bargaining activities and narrowly justified the extraction of only those fees. Non-collective bargaining fees and their activities were carefully separated. Thus, the single "agency shop fee" was judicially split into two separate and distinct fees. Accordingly, the mandatory extraction of both fees must be independently justified *prior* to collection.

The *Abood* Court acknowledged that any extraction involved First Amendment violations, but held that the congressionally determined goal of peaceful labor relations justified compelling payment of that portion of the service charge which was used "for the purposes of collective bargaining, contract administration, and grievance adjustment. . . ." *Abood*, 431 U.S. at 225-226. Significantly, however, the *Abood* Court did not extend this justification to the entire fee; political and ideological contributions could not be compelled.

Once it has been established that a portion of the agency shop fee is not justified by collective bargaining

activities, two competing interests emerge. There is the interest of the non-union employee who may object to any payment. As non-collective bargaining fees cannot be compelled, the non-union employee's interest is best described as a *narrowly* impinged constitutional right to the guarantees of the First Amendment.

Balanced against this right is the interest of the union which has been certified as the collective bargaining representative. The *Abood* decision established the right of the union, pursuant to constitutionally justified legislation, to exact payment for its collective bargaining activities from all employees, whether or not members. As such, the union's interest is properly defined as a statutory right to contribution for services provided.

These two interests clash when this Court is asked if the advance extraction of an entire fee from all employees, a portion of which is known to fund non-collective bargaining expenditures, can be maintained by the union.

It is the union's contention that because it is allowed to collect a part of this fee for collective bargaining purposes, and because it will refund that part expended for non-collective bargaining purposes to those who request it, it is permitted under the constitution to collect initially both portions of the fee. This confuses a clear distinction.

The union cannot be allowed to abuse its ability to collect fees for collective bargaining purposes to justify its extraction of monies for ideological purposes. *Amici* are aware of no paramount government interest which would permit the compelled collection of non-collective bargaining fees. *Elrod v. Burns*, 427 U.S. 347 (1976); *Abood*, 431 U.S. 209.

Moreover, the logical extension of such a claim would permit a minute, justified collection devoted exclusively to collective bargaining expenditures, to justify the collection of an unlimited amount of illegitimate

fees. See discussion *supra* at 7-8. This Court's adoption of such a justification would extinguish the individual's First Amendment protections afforded by *Abood*.

Similarly, the suggestion that a refund of illegally extracted payments will cure the underlying constitutional deficiency must be rejected. While tempting in its simplicity, it ignores a principle of equal simplicity in that it fails to provide the initial constitutional protection — the right to remain free from even a temporary deprivation. *Abood*, 431 U.S. at 244 (Stevens, J., concurring). Allowing a remedy to sanction an unjustified extraction is no different than permitting remorse to validate illegality.

Since the ideological fee is neither justified nor cured, any refund procedure is nothing more than a perpetual system of violations and possible repayments, paid in again, establishing new violations. Thus, the triggering constitutional infirmity is never removed.

Finally, any attempt to couple refundability, a judicially recognized remedy for past illegal payments *Allen*, 373 U.S. at 122, with an accompanying justification for certain exactions, *Abood*, 431 U.S. 209, and assert unitary legitimacy must also fail. This merely confuses remedy with substance, but does not go to the underlying question of the invalidity of the initial ideological extraction. There is no constitutional justification for the First Amendment infringement occasioned by the mandatory extraction of the ideological fee, nor does the subsequent refund serve to cure its deficiency.

This analysis creates no confrontation between constitutional rights and statutory interests. Nor is there any competition between objectors' rights and the constitutional rights of any other entity. Administrative convenience cannot prevail over constitutional rights.

To require the union to use only voluntary contributions for non-collective bargaining purposes will not impeded its ability to generate such funds. It will remain free to engage in all collective bargaining activities. It

will remain free to solicit and expend voluntary contributions for political and ideological purposes. It will remain free to engage in the ideological activities of its members' choice. Its only limitation will be on the ability to extract and retain, even temporarily, funds for non-collective bargaining activities over the objections of those who dissent.

Simultaneously, the First Amendment infringement on the freedom of all employees with respect to the portion of the fee to be devoted to collective bargaining activities is not extended beyond that previously upheld by this Court. *Abood*, 431 U.S. 209. Thus, the dissenting employee, although required to contribute his or her fair share of the costs of collective bargaining, will be protected from involuntarily subsidizing, even temporarily, the ideological positions adopted by the union.

The remedial rule adopted by this Court must protect the constitutional freedom of the objector. No deprivation of his funds, large or small, for whatever time, can be allowed.

II.

Collective Bargaining Activities Must Have a Sufficient Nexus to the Fee Payor

This Court is also confronted with the necessity of defining the scope of permissible activities which properly relate to collective bargaining. The union will seek an expansive reading of the term, asking this Court to adopt the United States Court of Appeals for the Ninth Circuit's view that expenditures which "promote, support or maintain the union" are constitutionally legitimate. *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 685 F.2d 1065, 1074 (9th Cir. 1982).

It is respectfully submitted that this definition is overly broad and would result in the unconstitutional expansion of the existent infringement on dissenting em-

ployees' First Amendment rights. Indeed, it could compel the involuntary financial support of any union activity. *Amici* assert that to be constitutionally valid, the chosen definition must ensure that the activities funded from compelled collections be directly connected to all of those employees from whom the funds are taken.

It is essential that there be a sufficient nexus between the collective bargaining process and the compelled collection in order to justify an ideological extraction. Mere convenience, or even principles of efficiency, will not provide the requisite link. Because constitutional freedoms are infringed to achieve ends only legislatively determined to be in the general welfare, the means utilized must be minimally intrusive upon the individual's rights. See generally, *Elrod v. Burns*, 427 U.S. 347 (1976).

Accordingly, the Court's initial focus should be on the goal sought to be achieved: efficient labor contract negotiation and administration. The next inquiry is the means to be employed, which must be the least intrusive to achieve this goal. Requiring that only fees directly linked to the collective bargaining process can be mandatorily extracted does achieve the end sought by Congress with minimal incursion on individual rights. Moreover, financial support to maintain the vitality of the collective bargaining process is ensured.

Sanctioning broad incursions into individual freedoms guaranteed by the United States Constitution transforms the union into a "free rider" in the political and ideological arena, ultimately maintained at the expense of the dissenting agency fee payor. It would indeed be anomalous if the justification for compelling the service fee, the prevention of "free riders," could be used to place the union in the position of one. *Street*, 367 U.S. at 761.

Should the definition of efficient contract negotiation and administration be found to encompass all or-

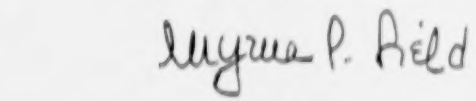
ganizing activities which "strengthen the union's position at the collective bargaining table," *Ellis*, 685 F.2d at 1074 (9th Cir. 1982), the means will have overcome the goal. Moreover, it would require this Court to ignore the legion of cases balancing competing rights, which have been traditionally resolved by sanctioning individual infringement only to the extent necessary to achieve the goal. See generally, *Elrod v. Burns*, 427 U.S. 374 (1976).

Therefore, the dilemma facing this Court should be resolved by limiting the expenditure of compelled contributions to those activities which are directly related to the collective bargaining agreement covering the individual employee. The test must be whether or not the expenditure is for an activity of direct benefit to the contributing employee. For example, an expenditure relating to the provision of the employee's individual health plan under the collective bargaining agreement could be so financed. Conversely, an expenditure relating to the promotion of a national health insurance program could not. Under such a formula, the union will continue to extract funds for the purpose of providing "collective bargaining, contract administration, and grievance adjustment services." *Abood*, 431 U.S. at 225-226. Simultaneously, the employee remains free of the compulsion to finance any ideology.

CONCLUSION

For the reasons stated above, the judgment of the court below should be reversed and the matter remanded.

Respectfully submitted,



Myrna P. Field
Attorney for the *Amici Curiae*
Mid-Atlantic Legal Foundation
1521 Locust Street — Suite 600
Philadelphia, PA 19102
(215) 545-1913

Of Counsel:
John G. Collins
Mid-Atlantic Legal Foundation, Inc.
219 East 42nd Street — 5th Floor
New York, NY 10017
(212) 557-1350

Joseph W. Marshall, III
Mid-Atlantic Legal Foundation
1521 Locust Street — Suite 600
Philadelphia, PA 19102
(215) 545-1913

CERTIFICATE OF SERVICE

I, Myrna P. Field, one of the attorneys for the *Amici Curiae* herein, hereby certify that on the 18th day of August, 1983, I caused to be served three (3) copies of the attached brief on the following:

Michael E. Merrill, Esq.
MERRILL AND SCHULTZ
4420 Hotel Circle Court
Suite 345
P.O. Box 87091
San Diego, California 92138

Laurence Gold, Esq.
American Federation of Labor and
Congress of Industrial Organizations
815 Sixteenth Street, N.W.
Washington, DC 20006

Myrna P. Field

MYRNA P. FIELD
Attorney for *Amici Curiae*
Mid-Atlantic Legal Foundation
1521 Locust Street
Suite 600
Philadelphia, PA 19102
(215) 545-1913

Of Counsel:
John G. Collins
Joseph W. Marshall, III
Mid-Atlantic Legal Foundation

August 18, 1983